

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2003-671

January 26, 2004

PUBLIC UTILITIES COMMISSION
Amendment to Underground Facility
Damage Prevention Requirements
(Chapter 895) Pursuant to P.L. 2003,
Chapter 373

ORDER PROVISIONALLY
ADOPTING AMENDMENTS

WELCH, Chairman; DIAMOND and REISHUS, Commissioners

I. SUMMARY

We provisionally adopt amendments to Chapter 895, the Underground Facility Damage Prevention Requirements Rule as follows:

- . to provide excavators doing excavation associated with drinking water well construction an exemption from the requirement to call the Dig Safe System, Inc. when there are no member facilities in the municipality in which the excavation is planned;
- . to facilitate the non-member notification process; and
- . to increase the effectiveness of the 3-day waiver contained in 23 M.R.S.A. § 3360-A(G).

With these amendments, we fulfill the directive in P.L. 2003, ch. 373 by streamlining notice requirement for water well constructors when possible and by establishing refinements to the notification procedures that will increase the effectiveness of the new law, codified at 23 M.R.S.A. §3360-A (3) (G), consistent with its purpose to eliminate delay to water well constructors and all excavators when there are no facilities in the excavation area. These amendments will also achieve significantly reduced false notifications and associated needless location expense to operators.

Because this is a major substantive rulemaking, these provisionally adopted amendments to Chapter 895 are now subject to review and adoption by the Legislature. 5 M.R.S.A. § 8071.

II. BACKGROUND

The law protecting underground facilities requires that a damage prevention system exist in Maine to ensure that adequate safety precautions protect the public when excavation occurs near an underground facility. 23 M.R.S.A. § 3360-A. The statute establishes procedures that must be followed by excavators and underground facility operators when excavation occurs. The Dig Safe System, Inc. (Dig Safe System or DSS) an independently owned corporation that operates the New England regional

damage prevention system, currently operates the underground safety system directed by law.

During the first session of the 121st Legislature, Maine's Legislature enacted P.L. 2003, ch. 373 (the 2003 Act), consisting of two parts. First, the 2003 Act amended 23 M.R.S.A. Section 3360-A to eliminate the Dig Safe law's 3-day waiting period requirement in instances in which there are no underground facilities in the excavation area. This means that an excavator may dig immediately after calling the Dig Safe System and all non-member operators that may have underground facilities in the area if the excavator is told that there are, in fact, no underground facilities within the excavation area.

Next, the law directs the Maine Public Utilities Commission (Commission or MPUC) to establish, by major substantive rulemaking, notice requirements for excavation associated with drinking water well construction.¹ The law also directs the Commission to consider the following in its rulemaking:

- A. Whether notice requirements established in the rule should be limited to the drilling of a well or should also apply to other excavation associated with well construction activities, such as trenching for installation of pipes and equipment;
- B. Whether notice requirements established in the rule should be based on factors such as geographic location, population density or other criteria bearing on the efficiency and effectiveness of the notification process and any offsetting public safety risks;
- C. Whether the amount of time required for notice prior to excavation should be reduced; and
- D. Whether any other notice requirements associated with drinking water well construction are appropriate.

On July 17 and 23, 2003, the Commission held meetings in Augusta with well constructors, other excavators, operators, and the Dig Safe System² to seek input about

¹An Act to Expedite the Drilling of Private Drinking Water Wells, P.L. 2003 , ch. 373, effective September 13, 2003, codified as 23 M.R.S.A. § 3360-A (5)(F).

² The Commission notified over 400 stakeholders of these meetings by mail and invited broad participation.

possible rule changes to address the water well construction issues, as well as other possible changes to the rule.³

The Commission developed a proposed rule that reflected the comments and suggestions that were made during those meetings and issued a Notice of Rulemaking on October 7, 2003. A public hearing was held on November 6, 2003 at the Commission's Hearing Room at 242 State Street, Augusta, Maine, at which the following people commented: Wayne Weeks of Weeks & Sons Well Drilling, Oakland; Ike Goodwin, Owner, Goodwin Well & Water, Turner, representing the Maine Ground Water Association (MGWA); Robert Finelli, Executive Director, Dig Safe System, Inc.; Stan Grover, Central Maine Power Company (CMP), also representing the Maine Dig Safe community; John Butts, Associated Constructors of Maine (ACM); Marc Levesque, On Target Locating Service (On Target)⁴; Chris Wilber, Portland Natural Gas Transmission System (PNGTS); and Skip Hodgdon, Hodgdon Well Drilling Inc., Minot.

Written comments on the proposed amendments were due December 3, 2003. The following persons filed written comments: Larry Pelletier, Excavation Contractor, Pine Hill Service, Orrington; Wayne Weeks, Weeks & Sons Well Drilling, Oakland; Susan Smith, Hansen's Well Drilling, Inc., Gorham; C. Thayne Hodgdon, President, Hodgdon Well Drilling, Inc., Minot; Katherine Mongue, CFO, Yankee Water Systems, Inc., Waterboro; Ronald W. Shannon, Owner, Shannon Drilling Water Wells, East Machias; James W. West, Director of Operations, Portland Water District (PWD); Robert Finelli, Executive Director, Dig Safe System, Inc.; Chris Wilber, PNGTS Operating Company, LLC; Chris Simpson, Maine Rural Water Association (MRWA); and Benjamin M. Sanborn, External Affairs Manager, Telephone Association of Maine (TAM).

III. PROPOSED RULE

Our proposed Rule contained two amendments. The first simply incorporated into the Rule, as Subsection 4(B)(1)(a)(i), a new provision waiving the 3-day waiting period for any excavator who notified the Dig Safe System and non-member operators and was told that there were no underground facilities within the planned excavation area. 23 M.R.S.A. §3360-A (3)(G).

The second amendment, as Subsection 6(A)(1)(d), specified that member operators must provide the Dig Safe System with facility location information "that achieves the highest degree of accuracy that the Dig Safe System is capable of utilizing." The purpose of this provision was to improve the effectiveness of the newly enacted 3-day waiver provision. Our Notice of Rulemaking posited that requiring

³ We are considering other changes to Chapter 895 in a separate rulemaking in Docket No. 2003-672.

⁴ On Target is an affiliate of CMP and contracts to do facilities locating for CMP and other operators, such as Verizon. Both CMP and On Target are subsidiaries of Energy East.

member operators to refine the underground facility location information that they provided to the DSS would result in a more accurate notification system with less delay and expense for all involved.

In addition, we invited comment on four questions on which we had been legislatively directed to make determinations. We included some discussion of these questions and our preliminary conclusions for comment.

IV. COMMENT SUMMARY

We received comments on our proposed rule from a representative array of interested stakeholders, comprising six well drillers, the state association of well drillers (MGWA), an excavators association (ACM), a rural water utility association (MRWA), the largest water and sewer utility in the state (PWD), the largest electric utility in the state (CMP), the main locating company in the state (On Target), an interstate natural gas pipeline company (PNGTS), an association of independent telephone operators (TAM), and the Dig Safe System. Their comments are summarized below.

A. Maine Ground Water Association and Individual Well Drillers

The well drillers and MGWA strongly supports our proposal to require operators to provide accurate information to the DSS on the location of their facilities to avoid unnecessary delays. They argue that “in situations where the risk of hitting underground facilities is low, the burden of notification requirements should be relaxed or eliminated.” Making the process more streamlined should encourage greater compliance in the excavation community, enhancing public safety. They point out that although there will be a cost to operators to provide this information, the savings the operators would enjoy from making fewer site location visits would offset it. They note it is critical to have member operators give the DSS accurate information so the new 3-day waiver provision of the law will have its intended effect. Well constructors also would enjoy greater productivity by not having the unnecessary 3-day waiting periods they now experience under the current inefficient operation of the DSS notification process. They estimate that of the approximately 95 well drillers in Maine, all but five or six are single operators with one rig and family owned businesses who can ill afford the lost productivity resulting from the current flawed DSS notification process. They note that any changes that make the system more efficient would help them.

The MGWA and well drillers also strongly urge the Commission to exempt them, and all excavators, from Dig Safe requirements in municipalities in which Dig Safe members have no underground facilities. They suggest that the Commission keep a current list of those municipalities posted on the MPUC and DSS websites. They support having the Commission require non-member operators to register with it so that it can provide operator contact information to excavators via the internet and identify the municipalities in which the operators have underground facilities.

B. The Dig Safe System, Inc.

The Dig Safe System strongly opposes a requirement that its call center develop and maintain non-member underground facility location information. It notes that it would be difficult for the DSS to effectively compile the list and that the cost and responsibility of doing so would be “immense.” The costs would be absorbed by Maine DSS members yet would be a service that did not benefit them. The DSS would incur liability for misinformation, errors or omissions. The DSS offers to provide a web link to the Commission’s database from the DSS website and to inform callers of their obligation to notify non-member operators.

C. Portland Natural Gas Transmission System

PNGTS objects to a wholesale exemption of well water constructors from Dig Safe requirements and to implementing a geographic boundary. PNGTS notes that its facility runs through much rural area in Maine, refuting well constructors’ arguments that there are no underground facilities in such areas. PNGTS argues that the use of specific data by the DSS is a security problem and also that Global Positioning System (GPS) data can be inaccurate. PNGTS states that “as a matter of national security, [it] does not distribute specific data on its exact pipeline location.” They also oppose having the DSS given responsibility for a non-member operator list or a reduction in the 3-day waiting period.

D. Portland Water District

PWD objects to the degree of specificity proposed in the draft Rule for operators to supply facilities location information to the DSS. It argues that detailed mapping information could present a security risk and also introduce confusion as the DSS attempts to read many different sets of maps with variable nomenclature. It also argues that maintaining specific mapping information would be an administrative burden and that it would open operators to liability should their information updating of rapidly growing systems be slow. It objects to reducing the 3-day marking deadline.

E. Maine Rural Water Association

MRWA commented that the draft Rule amendments strike a fair balance between well constructors’ desire for a more workable process and public safety, and that well constructors should not be exempted on a wholesale basis or based on geography or population density. MRWA supports the Commission’s development and maintenance of a non-member operators list, noting that such a list would enable the Commission also to distribute information about Dig Safe law requirements, rule changes, and educational opportunities to this constituency. MRWA offered to provide a list of its non-member operators for the Commission’s use. MRWA also commented that efficiency would be gained if the DSS had the non-member operator list, as excavators would need only to make one call to determine whether there were no underground facilities in the excavation area.

F. Telephone Association of Maine

TAM objects to the degree of specificity in the draft Rule for operators to supply facilities location information to the DSS. It argues that it would add significant costs to member operators with little demonstrated benefit. TAM supports the Commission's development of a non-member directory available on the internet. It does not support reduction of the 3-day waiting period prior to excavation.

V. DISCUSSION OF LEGISLATIVE ISSUES, COMMENTS, AND PROVISIONAL AMENDMENTS

We address the issues delineated by the Legislature as restated below.

1. Should modified notice requirements be limited to the drilling of a well or also apply to other excavation associated with well construction activities?

Participants at the legislative hearing on the 2003 Act, as well as at our pre-rulemaking excavators' meeting, discussed the nature of the water well construction business. Some of its features distinguish it from other types of excavation; some of its features do not. For example, water well drilling is often a relatively short procedure, leaving the drillers time to work on more than one job site in a day. In contrast, many construction projects require several days, weeks, or months to complete and, except in cases where the contractor is managing multiple excavation projects, may not require notification to the Dig Safe System with the same frequency as does well drilling, which may involve as many as two or three wells per day.

Well drillers noted that moving the drilling rig from location to location is time consuming and time spent traveling from job to job or to pre-mark one job and return to the next threatens already tight profit margins. Well drilling is often in great demand during times of drought and, in such times, neighbors and passers-by often approach working well drillers in an impromptu manner requesting their services on nearby lots. We note, however, that these features do not necessarily distinguish water well drillers from all other types of excavation businesses, particularly small job contractors and such excavators as driveway pavers, stump grinders, or fence installers that commonly receive relatively spontaneous requests. Well drillers also maintain that they often work on land that is undeveloped in remote areas of the state where no underground facilities exist. This, too, is not an exclusive feature of well drilling as there is generally other excavation work, such as for cellar, driveway, and utility installation, occurring when a parcel of land is being developed.

The MRWA, PWD and PNGTS do not support exempting well constructors from the requirements of the Rule on a wholesale basis. We have found no state in New England that gives an exemption to water well drillers as a select group. While we are mindful of the drillers' financial concerns, foregoing underground facilities

damage prevention safety precautions would ignore the public safety purposes of the law. In fact, nearly all of the well constructors who commented in this proceeding urged us to implement changes that would make the Dig Safe process more efficient and effective for preventing accidents for all excavators.

We, too, would prefer to adopt broadly applicable notification changes applicable to all excavation activities to avoid the problems that arise from making notification procedure changes only for one type of construction activity. Accordingly, some of the changes we provisionally adopt herein, such as having operators provide more precise underground facility location information to the DSS or committing PUC resources to developing a database showing which non-member operators have underground facilities in a municipality, are changes to the general obligations of all participants which will facilitate the efficient operation of the system and help render the newly enacted legislative provision in 23 M.R.S.A. §3360-A (3)(G) more effective.

Given that many types of businesses share the concerns expressed by the water well constructors, we see no compelling reason to support a finding that water well constructors alone should be exempted from the Dig Safe law's pre-excitation operator notification requirements. In this rulemaking, however, we provisionally adopt an exemption for water well constructors to the obligation to call the DSS if there are no member underground facilities within the municipality in which the excavator plans to dig. Nevertheless, we recognize that narrow application could erode the public safety benefits of the uniform requirement to "call before you dig" if the message becomes "call unless you are excavating for well construction." Inconsistent requirements for when to notify the DSS could lead to confusion and lax observance of the DSS notification requirements. It is better public policy, when a notification efficiency is identified, to establish consistent requirements for all types of excavations and all types of excavators. Yet, that outcome is only possible if the Legislature passes a law expanding the applicability of this rulemaking's provisions to all excavators. The legislation authorizing this rulemaking limits application of changes to the Dig Safe notification procedures to excavation associated with drinking water well construction. 23 M.R.S.A. § 3360-A (5)(F) (2003).

Absent a safety reason to the contrary, it would perhaps be preferable to provide all excavators with the same notification exemptions to ensure equal efficiency and to maintain uniformity of notice requirements for all similarly situated participants in the system, rather than for excavation associated with drinking water well construction only. Therefore, having found no differentiation in safety concerns between types of excavation in this proceeding, we determine that notice requirement changes determined in this rulemaking should not apply only to well-drilling, but should apply to other well construction activities. Furthermore, we will consider recommending that the Legislature authorize this exemption for all other excavation activities.

In sum, in answer to question (A) posed by 23 M.R.S.A. §3360-A (5-F), we make this exemption applicable to the broadest group allowed by the legislation, any excavation associated with drinking water well construction. We amend our Rule by adding Subsection 2(H-1), incorporating a definition of “drinking water well construction” that mirrors the language of the statute.

2. Should notice requirements established in the rule be based on factors such as geographic location, population density, or other criteria bearing on the efficiency and effectiveness of the notification process and any offsetting public safety risks?

a. Geographic or population density

At the legislative hearing, there were several proponents among the water well constructors of a geographic exemption from the requirements of the Dig Safe law. They argued for exemption from the entire Dig Safe law in rural areas of northern Maine given their expectation that far fewer underground facilities are located in remote areas of the state such as are typical of much of northern Maine. In comments, Pine Hill Service, Weeks & Sons Well Drilling, Hansen’s Well Drilling, Yankee Water Systems, Inc., Shannon Well Drilling and the Maine Groundwater Association requested that excavators be exempt from the requirement to call the DSS when there are no member facilities in the municipality.

Others, such as the natural gas pipeline, Portland Natural Gas Transmission System (PNGTS), noted that it is not the case that all areas in more rural regions of the state have no underground facilities or that there will be no facilities in particular areas where water well constructors wish to dig. Besides PNGTS, Maritimes & Northeast Pipeline, Granite State Gas Transmission Company, the Portland Pipe Line, and Mobile also have natural gas or oil pipelines that traverse remote areas of the state. These entities argue against an exemption for less populated areas or for other specified reasons because the safety and damage prevention purposes of the law are not affected by such factors.

The Commission’s statistics reveal that damage incidents have occurred in widespread areas of the state, including less populated areas such as Aroostook and Washington Counties, and that some of these incidents involved water well constructors. Further, as noted by both the U.S. Department of Transportation Pipeline Safety Inspector for the Eastern Region and well driller commenters, hazardous substance pipelines, which carry some of the largest public safety risks from potential regional interruptions of service, and which pose a personal injury and environmental hazard, cross many remote areas of Maine. These high-risk pathways, some of which may be long established and poorly marked, militate against complete exemption from Dig Safe requirements in low population density areas.

Having a geographically divided area or a population density threshold would require excavators to determine whether or not their proposed

excavation site falls within the exempted territory or not. Given that new development occurs continually, that development is often interspersed with undeveloped lots, and that whole towns are unlikely to have a uniform degree of underground facility installation, a reasonably safe, long-standing boundary between lower and higher risk areas could not be easily determined and might frequently put the driller at risk. Moreover, because neither population density nor geographic location provides an indication of whether there are underground facilities in an area, an arbitrary firm boundary would not be consistent with safety and damage prevention goals.

In the event a boundary were based on changing factors such as population density or degree of development, excavators would need to access updated information on the pertinent factor each time they proposed to dig to determine whether they are inside or outside of the exemption area. The need to make this determination would add uncertainty and confusion not present under the current law, which requires that all excavations by mechanical means must comply with Dig Safe notice requirements. Furthermore, the recently revised law, which allows an excavator to dig immediately after calling Dig Safe and non-member operators if there are no underground facilities in the excavation area, provides the necessary safety risk screening without need of further inquiry or discretion on the excavator's part or the risk to facilities that a discretionary system would introduce.

Because of these difficulties, we did not initially propose a geographic or population density based exemption. However, we now recognize that our reference database could make it possible to accommodate the requests from excavators that we exempt them from the requirement to call the DSS in areas where there are no member facilities as both a reasonable and workable solution to part of their concerns. In 2003, DSS reported that there were 240 municipalities in Maine in which there were no member operators' facilities. By amending our Rule to add Section 7(A-1), we propose to provide a reference source with our database to inform excavators whether or not there are DSS member facilities located in the municipality in which the excavation will take place, as well as the identities of any non-member facilities located in those municipalities that the excavator must notify. If there are no DSS member facilities within the municipality, then the Rule would exempt excavation associated with water well construction from the requirement to notify the DSS of the planned excavation. The excavator would still be responsible for notifying each non-member operator prior to excavating to obtain confirmation as to whether underground facilities are located within the excavation area.

b. One Hundred Foot Exemption

In our rulemaking we noted that three New England states' damage prevention laws (Vermont, New Hampshire, and Rhode Island) exempt from their notification requirements excavation sites located over 100 feet from any underground facility. We indicated that we did not support this exemption because it relies heavily on the excavator's imperfect knowledge, or more often, deduction of the existence and approximate location of underground facilities near the proposed

excavation area. We are concerned that reliance on such methods could result in significantly higher numbers of damage incidents. It is too early to evaluate its effect on the frequency of damage incidents in Vermont and New Hampshire which both only implemented this exemption in January 2003.⁵ Comments we received from PWD support our conclusion not to make this possible modification of the damage prevention law; we received no comments advocating this change.

c. Efficiency and effectiveness of the notification process

At the legislative hearing, members of the water well construction industry expressed particular concern with the following situations:

- A facilities locator cannot find the proposed excavation site in remote areas and abandons the effort commenting that “there’s nothing there anyway,” and costing the excavator unnecessary delay; and
- Excavators are required to wait three days for utilities to mark “No Facilities” when there are no underground facilities in or near the excavation site.

The Legislature addressed these concerns with the passage of P.L. 2003, ch. 373 §2, which eliminates the Dig Safe law’s 3-day waiting period requirement in instances in which the excavator confirms through the normal Dig Safe and non-member notification procedure that there are no underground facilities in the excavation area. In this circumstance, an excavator may dig immediately after providing the notifications. A coalition of stakeholders supported passage of this law, including major utilities, Associated Contractors of Maine and the Maine Ground Water Association. We insert this provision of law into Chapter 895 as Subsection 4(B)(1)(a)(i).

This provision should have significantly addressed the concerns expressed to the Legislative committee in May 2003 by eliminating unnecessary delay when excavators have projects in areas where there are no underground facilities. However, as the MGWA testified at our rulemaking hearing, we soon discovered that the effectiveness of this provision relies on the accuracy of the information held by the Dig Safe System’s response center, as member operators have provided it. The spokesman for MGWA, owner of a well digging business, testified that 79 of the approximately 300 total DSS notifications he received since passage of 23 M.R.S.A. §3360-A (3)(G), or approximately 37%, were false notifications as no member facilities existed within 150 feet of the excavation area. This represents 79 excavations for which he was required to wait 3 days unnecessarily before beginning excavation.

⁵ We do not consider Rhode Island’s damage statistics reliable indicators of what Maine would experience due to key differences in the structure of their damage prevention laws.

This demonstrates the degree to which excavators are currently disadvantaged, and the new legislative waiver provision is rendered ineffective, by member operator facility location designations to the DSS.

When notified of a proposed excavation, the Dig Safe System response center staff confirms whether or not member operators have underground facilities in the excavation area by referring to the location information provided to it by the owners of those facilities.⁶ The Dig Safe System currently is capable of providing information to excavators over the phone with a level of accuracy to the street on which the excavation site is proposed. Several utilities, however, have instructed the Dig Safe System that they are to be notified of any excavation proposed in any municipality in which the utility has facilities, irrespective of whether those facilities are underground. This greatly increases the instances in which an excavator will be forced to wait three days. In addition, this broad-brush approach causes the utilities to continually expend resources by sending a locator to areas in which the utility has no underground facilities.⁷ To the extent that a site visit can be avoided, efficiency is increased for the utility, the locating service, the DSS, and the excavator.

i. Burden to Operators

CMP commented that the requirement that operators provide the Dig Safe System with maps of underground facility locations in these formats to the degree of accuracy specified in our draft Rule will be onerous because it will require them to do a system-wide review to bring their records of the location of underground facilities into compliance with the reporting standard.⁸ While upgrading records and record-keeping procedures could result in costs to utilities who have not kept such records in the past, this will be a one-time exercise, the expense of which should be more than offset over time by the utility's savings from eliminating locating site visits to numerous excavation areas where no underground facilities exist.

⁶ Non-member operators advise the excavator directly based on their records. We focus on the member operators because we have not had reports that non-member operators cause similar delay to excavators.

⁷ CMP, which requests that the DSS contact it in the event of an excavation in any municipality in which it has facilities (not just underground), testified that it received approximately 40,000 requests for locates last year for its entire facility area. CMP's ARP 2003 filing reported that it had 40,734 miles of distribution conductor in service. CMP's 2002 Chapter 895 annual report indicated that it has 903 miles of underground facilities. This is approximately 2.2% of its total facilities, suggesting that the number of requests for locates related to underground facilities is likely to be a fraction of those that it is currently receiving.

⁸ We note, however, that CMP appears to already be in the process of gathering some of the information necessary to meet this standard. It keeps GPS and location information for its poles and padmount transformers. These records maintain attributes and characteristics that can help to indicate where there are underground leads off padmount transformers and poles.

Moreover, excavators will achieve savings through greater flexibility and increased efficiency if the instances in which they are unnecessarily burdened by the 3-day waiting period are eliminated.

ii. Security of Facility Mapping Details

PNGTS, CMP, and PWD raised security objections to the draft rule proposal that operators be required to provide mapping information “in a format that achieves the highest degree of accuracy that the DSS is capable of utilizing.” They stated that they have concerns providing precise facility location information to the Dig Safe System, or any entity, for fear that it might be stolen or somehow accessed for use in terrorist activities. We find that the potential benefits of more accurate information carry more weight for several reasons.

First, because of the DSS’s current software limitations, the degree of detail that the DSS is capable of handling is restricted to either GPS coordinates or the location along a particular street or road within a municipality. The system cannot reliably identify the facility location by the particular street number address. Thus, while we appreciate the efforts that all entities must make to ensure that information about critical infrastructure is not available for misuse, we do not believe the “street level” standard we are adopting in this rulemaking is likely to provide any greater clues about facility location to those who seek to do damage than present circumstances allow.

Second, this degree of facility location information would do little to advance a nefarious purpose. It is not until the operator marks the location of the facility, should it be within the excavation area, that its precise location is revealed. Even today it is possible, though not necessarily probable, that a terrorist posing as an excavator could get precise facility location information by calling in a false excavation site to have operators locate and mark them. Such a person could only do so after having determined, based on other information, that critical facilities were likely to be located in the pre-marked area. Yet, it is unlikely that someone would go to this effort because many utility or commercial facilities are above-ground or can be generally located by their proximity to above-ground appurtenances. For example, electric transmission lines and much of the distribution system, as well as many telecommunications facilities, are above ground, easily visible. Interstate natural gas facilities are located in broad corridors and are marked with stakes to alert trespassers to their presence and safety hazard.

Consequently, we add a provision to the rule as Subsection 6(A)(1)(d) to require Dig Safe System members to supply information on the location of their underground facilities in a format acceptable to the Dig Safe System that achieves a degree of accuracy to the street level.⁹ There are several ways an

⁹ The operator must indicate its facilities within 100 feet of a given street within each municipality by reference to the street.

operator can comply with this requirement. The option that will suit many operators, those that do not have sophisticated mapping systems, is to simply draw the specific physical location of all underground facilities on maps provided by the Dig Safe System. The degree of accuracy need only be to street level as that is the degree of precision that the DSS notification software is equipped to handle. Most underground distribution facilities are located in or within 100 feet of a street or road. Drawing a line along the road appearing on the maps provided by DSS will adequately record the location of these facilities. Because DSS provides maps to operators for this purpose, the issue raised by Portland Water District that DSS might misinterpret various mapping insignia is not a concern.

The Dig Safe System will then scan and digitize the drawn images and enter this data into its computer, which then can identify underground facilities locations within a 133 foot radius of a proposed excavation site. Operators should identify the location of underground facilities that are located more than 100 feet from a street or road by GPS coordinates. GPS devices are now readily available, relatively inexpensively. Testimony at our rulemaking hearing confirms that most excavators have not had undue difficulty in learning how to use these devices. Those operators who have their facilities electronically mapped may provide underground facility location information to the DSS in electronic or digital format. Others may wish to supply GPS coordinates.

Accordingly, we will amend the rule, adding Subsection 6(A)(1)(d), to require that operators provide facility location information designating the street upon which it is located or GPS coordinates if there is no proximate street (within 100 feet). To give operators some assurance that the DSS maintains operator information in a secure manner and restricts its use to the purposes of the Dig Safe law, however, we propose to add such a provision to our rule as Subsection 5 (B) (9).

d. Non-member database

To make the process for excavation notifications more efficient, we believe that it would be useful for excavators to have an easily accessible resource containing the names and contact information for all non-member operators that may have facilities located in the proposed excavation area. This is not currently a service provided by the DSS, which only collects and provides information pertaining to its members, although we noted in our Notice of Rulemaking that DSS would be a logical choice for this service because an excavator working in a remote area might need to only make one call to ascertain that no underground facilities exist in the proposed excavation area. We also suggested that Contractor associations might also consider providing such a service for the benefit of their members.

We invited comment on the benefits of having a directory of non-member operators by municipality for excavator reference and on what form such a reference should take to make it most useful to excavators. We also invited comment

on whom the best keeper of this information would be and whether any legislative or rule changes should be made to formalize or authorize this service.

The MGWA, ACM, and excavators who commented endorsed this idea and supported having the Commission maintain the database.

The DSS opposed any requirement that it maintain a database containing non-member information because of concerns regarding liability, feasibility, the costs that would fall on its members for a service to non-members, and the disincentive it would create for non-members to voluntarily join the DSS. CMP argued it would be better to require all operators to become members of the DSS and to keep the information, service, and costs all in one entity. We agree. The Legislature, however, has thus far declined to require all operators to become members of the DSS. Without legislative support for this prospect, we are left to find other ways to satisfy legislative objectives, such as streamlining pre-excavation notification requirements at public agency expense.

Therefore, because excavators have informed us that such a list would be very beneficial to them and, by facilitating notifications, could improve compliance with the Dig Safe law, we will endeavor to develop one. To ensure that our database is current, we amend the Rule by adding Subsection 6(C)(3) to require non-member operators to notify us when installing underground facilities in a new municipality.

3. Should the amount of time required for notice prior to the excavation be reduced?

Certain other New England states have a 2-day waiting period between the time an excavator calls the Dig Safe System and the time it is allowed to begin excavation. Operators must complete on site mark-outs of their facilities within the waiting period. Maine's law allows a 3-day waiting (and marking) period. In our pre-rulemaking discussions, the operators and an overworked locating service were not in favor of reducing the waiting (marking) period, arguing that it would increase costs. While in favor of a reduced waiting period, excavators also noted that operators and locators have experienced difficulty meeting the 3-day deadline for marking their underground facilities. Operators commented that a 2-day marking period might be adequate in a geographically small state, such as Rhode Island, but is not likely to be sufficient in a geographically large state such as Maine.

As a general matter, excavators appear to have successfully integrated the 3-day waiting period into their planning horizon so that the requirement does not pose a hardship in most instances. Some commenters noted that Connecticut has a short notice option for circumstances where an excavator wishes to begin excavation on a shorter schedule than normal, but which are not emergency situations. However, they also remarked that damage incidents have risen substantially as a result of this change in Connecticut law.

It is apparent that even a 2-day waiting period would not resolve water well constructors' concerns given that a driller often drills as many as three wells in a single day. Well drillers seek to avoid the Dig Safe law's notification procedures when circumstances allow, to give them flexibility to respond to frequent requests by neighbors near a well drilling job site who request that the well driller also dig a well on their nearby property. Doing multiple jobs while in an area is more efficient than returning to the location at a later time. We do not expect that reducing the waiting period from three to two days would resolve the water well constructors' concerns.

We heard little to persuade us that a reduced waiting period would be a beneficial change to the current Dig Safe law. There does not seem to be much support in the larger damage prevention community for making this change, which could adversely affect safety and increase the cost of complying with the law. PNGTS, PWD, TAM, CMP and MRWA commented in opposition. It also does not appear that a reduction in waiting time to 2-days would resolve water well drillers' concerns. Therefore, we propose no change to the notice time.

4. Are there other notice requirements associated with drinking water well construction that the commission determines appropriate to adopt by rule?

We invited comment and specific suggestions on other changes to the Dig Safe law's notice requirements that would both maintain the safety standards of the law and resolve water well constructors' grievances with its requirements. As noted above, water well constructors requested to be exempt from DSS notification procedures when there are no member facilities in the excavation area. In 2003, DSS reported that there were 240 municipalities in Maine in which there were no member operators' facilities. What is needed is a reliable system that can be used by water well constructors to identify those areas where no DSS member underground facilities exist, one that accommodates installation of underground facilities into new areas as it occurs.

Our non-member reference database provides a resource for water well constructors and other excavators to use to determine whether there are any non-members who must be notified prior to excavation pursuant to the Dig Safe law. Adding to that database information that shows in which municipalities DSS member facilities are located would allow excavators to consult only one source for information about necessary notifications and could inform them when it is not necessary to contact the DSS. The Legislature could exempt excavators from the requirement to notify the DSS of the planned excavation if there were no DSS member facilities within the

municipality.¹⁰ The excavator would still be responsible for notifying each non-member operator prior to excavating to obtain confirmation as to whether underground facilities are located within the excavation area.

We are sympathetic to this seemingly logical request from well constructors. Adding to that database information that shows in which municipalities DSS member facilities are located will allow water well constructors to consult only one source for information about necessary notifications and will inform them when it is not necessary to contact the DSS. Our amendment to exempt water well constructors from the requirement to contact the DSS when there are no member facilities located in the municipality in which excavation is planned eliminates one notification contact for water well constructors in circumstances where that contact is unnecessary.

To ensure that our database is current, we amend the Rule to require operators, whether members or non-members, to notify us when installing underground facilities in a new municipality by adding Subsection 6(C)(3).

Because the accuracy of this system relies on timely operator notification (and expeditious updating using that information), not simply on excavator notification, we further amend Subsection 6(E)(1) of the Rule to absolve a non-negligent water well constructor of liability if it has complied with the Rules for a water well construction exemption (i.e. consulted our reference within 30 days of beginning excavation and determined from the database information that no DSS member facilities were located in that municipality.)

While this system overlaps to some degree with the responsibilities of the DSS, and departs, for water well constructors, from the message the DSS emphasizes to all excavators to “call [the DSS] before you dig,” it nevertheless achieves the legislative goal articulated in 23 M.R.S.A. §3360-A subsection (5)(F).

IV. CONCLUSION

We provisionally adopt the following amendments to Chapter 895, the Underground Facility Damage Prevention Requirements Rule, to facilitate the non-member notification process and to increase the effectiveness of the 3-day waiver contained in 23 M.R.S.A. §3360-A(G):

1) To aid excavators in identifying non-member operators requiring notification and to streamline the notification process by eliminating unnecessary calls to the DSS,

¹⁰ As noted above, the general consensus among commenters was that notification efficiencies should be available to all excavators, not just well constructors. However, that outcome is only possible if the Legislature passes a law expanding the applicability of this rulemaking’s provisions to all excavators because our authority to make changes to the Dig Safe notification procedures only applies to excavation associated with drinking water well construction. 23 M.R.S.A. § 3360-A (5)(F) (2003).

we will institute a new database listing nonmember operators and the municipalities in which they or member operators have underground facilities. This database will provide a reference, accessible by web page or telephone, that water well constructors and excavators may contact to learn which non-member operators must be notified in a particular municipality and whether the well constructor must call the DSS. Section 7(A-1);

2) To provide accurate non-member contact information, we require each non-member operator to register with the Commission by providing its name, the name and telephone number of a contact person for excavation notifications, and the municipalities in which it has underground facilities. Further, we require each non-member to verify the validity of this information annually and to notify the Commission, as soon as possible, of any changes. Subsection 6(C)(4);

3) To keep our database current, we require every operator to notify the Commission when installing and when it identifies, underground facilities that it is obligated to mark pursuant to Section 6(B) in municipalities in which the operator did not previously have any underground facilities. Subsection 6(C)(3);

4) To make the Dig Safe System notification process more efficient, we require all operators to provide the Dig Safe System with facility location information by association with a street or, in cases where the facilities are located more than 100 feet from the street, to provide the DSS with GPS coordinates for the facility. Subsection 6(A)(d);

5) To enhance the accessibility of our database, we amend our Rule to reflect that the Dig Safe System will assist the Commission to the extent practicable in facilitating access for Maine excavators who call the Dig Safe System to the Commission's reference database. Subsection 5(B)(8);

6) To help ensure that facility location information is secure, we direct the Dig Safe System to restrict the use of operator facility location information provided to it to uses required to perform its duties under this Rule and to use reasonable care to maintain such information in a secure manner. Subsection 5(B)(9); and

7) We exempt excavators doing excavation associated with water well construction from the requirement to notify the DSS after consulting our database and ascertaining that there are no member facilities in the municipality in which excavation is planned. Subsection 4(B)(1)(a)(ii).

Accordingly, we

O R D E R

1. That the attached Chapter 895, Underground Facilities Damage Prevention Requirements, is hereby provisionally adopted;

2. That the Administrative Director shall submit the provisionally adopted rule and related materials to the Legislature for review and authorization for final adoption;
3. That the Administrative Director shall file the provisionally adopted rule and related materials with the Secretary of State; and
4. That the Administrative Director shall send copies of this Order and attached rule to:
 - a. All underground facility operators and excavators for which addresses are available;
 - b. All persons who have filed with the Commission within the past year a written request for notice of rulemakings;
 - c. All persons on the Commission's list of persons who wish to receive notice of all electric restructuring proceedings;
 - d. All persons who have filed comment in Docket No. 2003-671;
and
 - e. The Executive Director of the Legislative Council (20 copies.)

Dated at Augusta, Maine, this 26th day of January, 2004.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
 Diamond
 Reishus